BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN D. HEATH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,047,851
RUSSELL STOVER CANDIES	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the December 31, 2009 Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders.

ISSUES

Claimant requests medical benefits and temporary total disability benefits for an alleged series of work-related injuries to his neck, low back and left upper extremity. In the December 31, 2009 Preliminary Hearing Order, Judge Sanders found it was "more likely than not that Claimant's injury to his cervical and lumbar spine arose out of and in the course of employment"[1] with respondent. The ALJ also found claimant provided notice of his accident to his supervisor on May 4, 2009. ALJ Sanders designated Dr. Glenn Amundson as the authorized treating physician but denied claimant's request for temporary total disability benefits.

Respondent contends ALJ Sanders erred. Respondent argues claimant did not sustain his burden of proof that his injuries arose out of and in the course of his employment. In support of its argument, respondent asserts none of claimant's alleged work injuries are noted in his personal medical providers' records but, rather, those records listed other incidents that caused claimant's complaints. Respondent requests that the Board overturn the December 31, 2009 Preliminary Hearing Order.

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[1] ALJ Preliminary Hearing Order (Dec. 31, 2009) at 2.

Claimant points out that ALJ Sanders determined claimant's repetitive job requirements (lifting, bending and twisting) resulted in repetitive traumas that aggravated and exacerbated his cervical and lumbar condition. Claimant asserts the ALJ had the opportunity to observe him testify and found him credible. Further, claimant maintains his testimony alone is sufficient evidence of his physical condition. In addition, claimant argues Dr. P. Brent Koprivica was the only physician who addressed issues of causation in this claim and that the doctor opined claimant's work activities permanently aggravated his physical condition. Claimant requests the Order be affirmed.

The issues before the Board on this appeal are:

1. Whether claimant's injury arose out of and in the course of his employment with the respondent.

2. Whether claimant gave proper notice of his accidental injury to the respondent.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant worked as a machine operator for the respondent for four and one-half years. His work included lifting, bending and twisting. May 4, 2009, was the last day claimant worked for respondent.

Claimant testified he started having problems with his left arm in February 2009. He also started experiencing pain in his neck and back. According to claimant, his pain continued to worsen until May 4, 2009, when he was casing two-pound boxes of candy. On that day claimant was unable to perform his duties due to the pain. He advised his supervisor he could not do his work because of the pain and consequently left work.

Claimant was seen by Dr. Michael D. Grant at StatCare – Family Minor Emergency Center on April 21, 2009, complaining of neck pain. Dr. Grant prescribed pain medication and provided claimant an off-work slip.

Per Dr. Grant's recommendation, claimant saw his personal physician on April 23, 2009. Dr. Grant also referred claimant to neurosurgeon Dr. Ali B. Manguoglu. Dr. Manguoglu examined claimant on June 3, 2009. In a June 3, 2009 letter to Dr. Grant, Dr. Manguoglu stated:

> On exam, he has restriction of neck motions with extremes of motion. He complained of neck pain and grinding feelings in his neck. Foraminal closure test

> is negative. Reflexes are trace in the extremities. There is no evidence of myelopathy. Patient has diminished pinprick sensation in the distribution of medial nerve, positive Phalen's and Tinel's signs over the left carpal tunnel. Strength seems to be 5/5. Straight leg raising is mildly positive at 80° on the left side.
>
> Cervical MRI scan shows spondylitic changes, moderate degree of cervical spinal stenosis due to spondylosis.
>
> IMPRESSION:
> 1) NECK PAIN DUE TO A MODERATE DEGREE OF CERVICAL SPONDYLOSIS AND SPINAL STENOSIS. NO LARGE DISC HERNIATION.
> 2) PROBABLE LEFT CARPAL TUNNEL SYNDROME.
> 3) LOWER BACK PAIN AND LEFT SIDED SCIATICA, MOST LIKELY DUE TO SPONDYLOSIS OF THE LUMBAR SPINE.[2]

Claimant was referred to Dr. William D. Kossow for EMG and nerve conduction studies of his upper and lower extremities. Subsequently, a left carpal tunnel release was performed on July 16, 2009. Claimant also received an epidural steroid injection at the C6-C7 level of his cervical spine.

Dr. Manguoglu released claimant to return to work on August 12, 2009. Respondent terminated claimant on August 17, 2009, for attendance issues.

On November 30, 2009, claimant saw Dr. P. Brent Koprivica at claimant's attorney's request. Dr. Koprivica opined:

> It is my opinion that as a direct and proximate result of Mr. Heath's work-related activities from January of 2009 through May 4, 2009, at Russell Stover Candies, Incorporated, Mr. Heath developed severe carpal tunnel syndrome on the left along with permanent aggravation, acceleration and intensification of cervical spondylosis and lumbar spondylosis. In the lumbar region, this permanent aggravation and intensification have resulted in electrodiagnostic evidence of a left-sided L5-S1 radiculopathy.[3]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the various conditions on

[2] P.H. Trans., Cl. Ex. 1.

[3] *Id.*

which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

Claimant's job required repetitive lifting, bending and twisting. Claimant testified these activities routinely caused pain in his back, neck and arm. Claimant's testimony is supported by the medical opinion of Dr. Koprivica. The ALJ, who personally observed the claimant testify, found claimant credible. Consequently, this Board Member finds that claimant has sustained his burden of proof. Claimant's injuries arose out of and in the course of his employment with respondent.

In its application for review, the respondent listed proper notice as an issue for review. However, in its brief to the Board respondent failed to address the issue. It is unclear whether respondent intended to abandon the issue of notice. Hence the issue will be summarily addressed. When an accident occurs as a result of a series of events, as is the situation in the case at bar, the date of accident can be established per several methods depending on the facts of the case.[7] Under the facts of this case the date of the accident is determined to be the date written notice of the injury was given to the

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[4] K.S.A. 2009 Supp. 44-501(a).

[5] K.S.A. 2009 Supp. 44-508(g).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[7] K.S.A. 2009 Supp. 44-508(d).

respondent. The claimant provided verbal notice on May 4, 2009, and written notice on October 15, 2009.[8] Notice was proper.

CONCLUSION

Claimant sustained injury arising out of and in the course of his employment with the respondent. Claimant gave proper notice of his accidental injury to the respondent.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this Board Member affirms the December 31, 2009 Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

[8] October 15, 2009, is the date on the certified mail receipt for claimant's October 12, 2009 letter to respondent regarding his injuries.

[9] K.S.A. 44-534a.